IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

R.S.A. No. 229 of 2004.

Reserved on: 30.05.2012.

Decided on: 12.06.2012.

Shri Pritpal Singh, son of S. Jagdev Singh, Paul Trading Company, Village and P.O. Dharampur, Tehsil Kasauli, District Solan (HP)-173009.

...Defendant/appellant.

-Versus-

1(a) Shri Subhash Chand Goel, son of late Shri Kailash Chand, C/o M/s Subhash Chand Surender Kumar, Main Bazar, Dharampur, District Solan-173209 (HP).

1(b) Shri Brij Mohan Goel, son }
1(c) Shri Sunil Kumar Goel, son }
1(d) Shri Rajesh Kumar Goel, son } of late Shri Kailash Chand.

All residents of Kailash Building, Main Bazar, Dharampur, District Solan-173209 (HP).

1(e) Shri Surender Kumar Goel, son of late Shri Kailash Chand, Kariana Store, Main Bazar, Dharampur, District Solan (HP)-173209.
1(f) Shri Praveen Kumar Goel, son }
1(g) Shri Ashok Kumar Goel, son } of late Shri Kailash Chand.
Both C/o M/s. Kailash Chand and sons, Main Bazar, Dharampur, District Solan (HP).

.....Respondents.

Regular Second Appeal under Section 100 of the Code of Civil Procedure.

Coram:
The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] *No.*

For the appellant	:	Mr. Bhupender Gupta, Senior Advocate, with Ms. Charu Gupta, Advocate.
For the respondents	:	Mr. K.D. Sood, Senior Advocate, with Mr. Rajnish K. Lall, Advocate.

---

[1] *Whether the reporters of the local papers may be allowed to see the judgment? No.*

Rajiv Sharma, Judge:

This Regular Second Appeal is directed against the judgment and decree dated 27.02.2004, passed by the learned Additional District Judge, Solan, H.P. in Civil Appeal No. 53-S/13 of 2003.

2. Material facts necessary for adjudication of this Regular Second Appeal are that the respondent-plaintiff, namely, Kailash Chand (hereinafter referred to as 'the plaintiff' for the sake of convenience), had filed a suit for possession against the appellant-defendant (hereinafter referred to as 'the defendant' for the sake of convenience). According to the plaintiff, he is owner in possession of one double storeyed building, situated at Dharampur, Tehsil Kasauli, District Solan on Kalka Shimla road. The said building on one side is abutted by Rai Bahadur Sewak Ram (Trust) Society building and the other side is vacant land. Out of four shops on the ground floor, third shop from Kalka side or second shop from Shimla side has been with the defendant at a monthly rent of ₹400/- since 01.09.1981. The tenancy was monthly tenancy and was determined by notice issued under Section 106 of the Transfer of Property Act, dated 16.01.1997 through a registered A.D. and UPC. The defendant was required to hand over the possession to the plaintiff from 28.02.1997 onwards. According to the plaintiff, the defendant is presently a tress-passer as the tenancy stood determined from 28.02.1997 and he is liable to pay use and occupation charges at the rate of ₹50/- per day from 01.03.1997 onwards.

3. The suit was contested by the defendant. The defendant has admitted the service of notice for determination of

his tenancy. According to him, the new tenancy was created by the landlord. The rent was enhanced from ₹400/- to ₹600/- per month and the same was received by the plaintiff on 31.01.1997. The receipt was also issued by the plaintiff in his own handwriting in Urdu.

4. Replication was filed by the plaintiff. The issues were framed by the learned Sub Judge 1st Class, Kasauli at Solan, District Solan, H.P. on 21.08.2001. The suit was decreed against the defendant for ejectment from one shop at Dharampur. The defendant preferred an appeal before the learned Additional District Judge, Solan, H.P. He dismissed the same on 27.02.2004. Hence, this Regular Second Appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 24.09.2004:

> *"Whether the acceptance of enhanced rent after issuance of notice under Section 106 of the Transfer of Property Act amounts to waiver of notice and plaintiff-respondent is not entitled to seek ejectment of the appellant-defendant on the basis of such notice?"*

6. Mr. Bhupender Gupta, learned Senior Advocate for the appellant, on the basis of substantial question of law framed, has vehemently argued that the new tenancy was created after the enhanced rent was received by the plaintiff on 31.01.1997.

7. Mr. K.D. Sood, learned Senior Advocate, for the respondents has supported the judgments and decrees passed by both the Courts below.

8. Plaintiff, Shri Kailash Chand has died during the pendency of this appeal and his L.Rs. were brought on record.

9. Plaintiff has appeared as PW-1. He has proved the notice Ex. PW-1/A, issued under Section 106 of the Transfer of Property Act, UPC receipt Ex.-PW1/B, postal receipt Ex.-PW1/C. The defendant has not led any evidence.

10. PW-1 has denied that after receiving the notice Ex.-PW1/A by the defendant, the defendant has approached him and requested to enhance the rent from ₹400/- to ₹660/- and fresh tenancy was started qua the shop w.e.f. 16.01.1997. The defendant has not led any tangible evidence to prove that fresh tenancy was created by the plaintiff in his favour. According to the defendant, the plaintiff has agreed to create fresh tenancy in his favour on 16.01.1997. The notice itself is dated 16.01.1997 and it has come in evidence that the notice was posted by the plaintiff on 17.01.1997 from Solan. In fact, the notice was received by the defendant on 20.01.1997. In these circumstances, it cannot be believed that defendant had approached the plaintiff for creation of new tenancy after the receipt of notice dated 16.01.1997.

11. Mr. Bhupender Gupta, learned Senior Advocate for the appellant has vehemently argued that the plaintiff has not issued the receipt dated 31.01.1997 to his client.

12. The defendant was required to clearly spell out the terms and conditions under which the receipt was executed and why the amount of ₹660/- was paid. There was to be the intention of the plaintiff to create tenancy in favour of the defendant. The defendant has not appeared in the witness box.

13. Their Lordships of the Hon'ble Supreme Court in **Bhawanji Lakhamshi and others** Vs. **Himatlal Jamnadas Dani and others**, AIR 1972 Supreme Court 819 have held as under:

"12. Learned counsel for the appellants argued that whenever rent is accepted by a landlord from a tenant whose tenancy has been determined, but who continues in possession, a tenancy by holding over is created. The argument was that the assent of the lessor alone and not that of the lessee was material for the purposes of Sec. 116. We are not inclined to accept this contention. We have already shown that the basis of the section is a bilaterial contract between the erstwhile landlofd and the erstwhile tenant, if the tenant has the statutory right to remain in possession, and if he pays the rent, that will not normally be referable to an offer for his continuing in possession which can be converted into a contract by acceptance thereof by the landlord. We do not say that the operation of Section 116 is always excluded whatever might be the circumstances under which the tenant pays the rent and the landlord accepts it. We have earlier referred to the observations of this Court in AIR 1961 SC 1067 regarding some of the circumstances in which a fresh contract of tenancy may be inferred. We have already held the whole basis of Section 116 of the Transfer of Property Act is that, in case of normal tenancy, a landlord is entitled, where he does not accept the rent after the notice to quit, to file a suit in ejectment and obtain a decree fro possession, and so his acceptance of rent is an unequivocal act referable only to his desire to assent to the tenant continuing in possession. That is not so where Rent Act exists; and if the tenant says that landlord accepted the rent not as statutory tenant but only as legal rent indicating his assent to the tenant's continuing in possession, it is for the tenant to establish it. No attempt has been made to establish it in this case and there is no evidence, apart from the acceptance of the rent by the landlord, to indicate even remotely that he desired the appellants to continue in possession after the termination of the

tenancy. Besides, as we have already indicated the animus of the tenant in tendering the rent is also material. If he enders the rent as the rent payable under the statutory tenancy, the landlord cannot, by accepting it as rent, create a tenancy by holding over. In such a case the parties would not be id idem and there will be no consensus. The decision in AIR 1961 SC 1067 which followed the principles laid down by the Federal Court in 1949 FCR 262=(AIR 1949 FC 124) is correct and does not require re-consideration.

13. We, therefore, come to the conclusion that there was no holding over by the appellants and if that be so, the question whether the tenancy created by holding over was for manufacturing purpose and therefore the landlord was bound to give six months' notice for the determination of the tenancy by holding over does not arise for consideration."

14. Consequently, the findings recorded by both the Courts below that the tenancy stood determined w.e.f. 28.02.1997, on the basis of notice dated 16.01.1997, warrants no interference. Moreover, there is no substantial question of law involved in this Regular Second Appeal.

15. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed, so also the pending application(s), if any. No costs.

(Rajiv Sharma)
Judge

June 12, 2012.
(bhupender)